U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Date: January 8, 2002

Case No.: **2000-INA-288**
CO No.: **P2999-NY-02412532**

In the Matter of:

MILLERSHOR, INC.
Employer

on behalf of

LEI CHEN
Alien

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Steven E. Perlman, Esquire
Perlman & Associates, PLLC
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

Statement of the Case

On June 12, 1997, Millershor Inc. ("Employer") filed an *Application for Alien Employment Certification* (ETA 750) to permit the employment of Lei Chen ("the Alien") as a "Fashion Designer." (AF 2-6). The duties were described as follows:

> Design women's suits, dresses and blouses. Analyze and follow fashion trends, prepare clothing design sketches and finalize design patterns. Write specifications in Chinese to manufacturers in China and Hong Kong using measuring/drawing instruments and liaise daily with them to ensure conformity to specs.

(AF 6). Minimum requirements for the position were stated to be a Bachelor's degree in Fashion Design and one year of experience in the job offered. The Alien's immediate supervisor was shown as the Design Director. The salary was listed as $26,000.00 per year based on a 40 hour work week. *Id*.

The ETA 750 was initially processed by the New York Department of Labor (NYDOL). The Employer was informed by NYDOL on December 3, 1998 that the prevailing rate of pay for its job opening was $30.27 per hour based on the Occupational Employment Statistics' (OES) survey-fashion designer-MSA code 5600- Occ. Code 34038 - Level 2 - eff. 05/04/1998. (AF 7-12). The Employer was informed further that:

> Effective January 1, 1998, the U.S. Department of Labor, Employment and Training Administration, requires State Employment Agencies (SESAs) to use the wage component of the Bureau of Labor Statistics expanded OES survey.
>
> The OES program groups occupations into broad categories of similarly skilled workers and provides wage data for these categories by area. Most OES categories contain a number of occupations classified separately by the Dictionary of Occupational Titles. There are only two wage levels designated for use in each OES category and area. Level 1 represents beginning level employees. Level 2 represents fully competent employees and those whose jobs require advanced degrees above the norm for the occupation.

(AF 10). Instructions were furnished to the Employer if it desired to submit alternative wage data. In essence, these were to the effect that the survey had to be timely, cover the area of intended employment, include a job description applicable to the Employer's survey, include data collected across industries that employ workers in the occupation, provide an arithmetic mean (weighted average) of wages for workers in the appropriate classification and include the methodology used to show that it is reasonable and consistent with recognized statistical standards and principles. (AF 8-10).

The Employer responded by submitting the following statement from the Director, Career Services of the Fashion Institute of Technology (FIT):

> According to our most recent statistical report, the salary for graduates of the BFA degree fashion design program was $22,000 - $30,000. The average salary was $25,743. The average salary is established by adding all salaries and then dividing by the total number of graduates.
>
> The average salary for a graduate with one year of work-related fashion design experience is $27,000 in the New York area.

(AF 28). An accompanying chart prepared by FIT shows that the average salary of $25,743 was based on 22 1997 graduates who were employed full-time. All but two worked for manufacturers with 18 holding assistant or trainee type positions. (AF 25-27). The Employer thus increased its wage offer to $31,000 per year. (AF 16, 29).

The NYDOL referred the case to the CO without having the Employer proceed with recruitment. The CO, in turn, issued a Notice of Findings ("NOF") on February 16, 2000, proposing to deny the application. (AF 34-36). The CO found that Employer's wage offer was below the prevailing wage of $62,004.80 per year based on the same survey identified in the NYDOL notification. (AF 34-35). The CO noted that the FIT wage survey had been reviewed by the NYDOL Prevailing Wage Specialist and rejected for the following reasons:

> The wage source is restricted to 1997 graduates of FIT with a BFA. Consequently the wage data collected is neither random nor representative of workers in the occupation. It is rather a measure of entry level or beginning wage in the occupation. The FIT source, in addition, does not provide a job description for the classification Fashion Design. The subject wage source specifically does not detail the job duties, and the responsibilities associated with the occupational classification. Consequently the FIT average wage result of $25,743 per year cannot be applied to the job opportunity as described by the employer.

(AF 35). The Employer was advised that it may rebut the finding by increasing the salary offer to equal or exceed the prevailing rate of pay or by submitting a wage survey that meets the criteria of item J of the General Administrative Letter (GAL) No. 2-98.[1] *Id*.

A rebuttal to the NOF was submitted by counsel for Employer on March 22, 2000, in which he took issue with the critiques of the Wage Specialist. (AF 37-39). He contended that FIT is the major source of fashion design graduates in the New York City area and is eminently qualified to provide information on the wage market for recent entrants to this field. Counsel

---

[1]Official notice is taken of the fact that the instructions for submitting a wage survey included in the NYDOL letter to the Employer are the same as those contained in item J of GAL 2-98.

contended further that the job titles of the graduates used in the FIT survey adequately shows that they are performing Fashion Design work. He also challenged the use of the OES Level 2 wage for the instant position as the Level 2 is an average of all experience levels whereas as the Employer's job offer is for a Fashion Designer with only one year of experience. *Id*.

On May 30, 2000, the CO issued a Final Determination ("FD") denying the application. (AF 47-48). The CO found that Employer had not furnished any documentation that responds to the Wage Specialist's objections in that it had not shown that the data it submitted was based on a randomly selected sample and is representative of workers in the occupation, nor had it furnished the job description of the occupation surveyed. (AF 48).

The Employer then addressed a letter to the "Chief ALJ/Certifying Officer DeHaan" requesting "your review" of the Final Determination on the basis that the wage determination of the NYDOL Wage Specialist was a "wholesale distortion of reality by a factor of two" whereas the wage survey the Employer submitted clearly reflected the reality of the marketplace. (AF 49-56). Included with his request was a survey of recent wage data for fashion designers with one to two years experience that was conducted by contacting 23 "headhunting agencies" and 37 fashion companies in the New York City area. The "headhunting agency" survey reportedly produced the following results:

WAGE RANGE	NO. OF AGENCIES	PERCENTAGE OF TOTAL
25K - 30K	16	70%
30K - 35K	6	26%
35K - 40K	1	4%

Arithmetic Mean = 32.K

(AF 53-54). The Fashion company survey resulted in 29 responses as follows:

WAGE RANGE	NO. OF COMPANIES	PERCENTAGE OF TOTAL
25K- 28K	13	44%
28K - 30K	8	28%
30K - 32K	4	14%
32K - 35K	2	7%
35K - 37.5K	2	2%
37.5K - 40K	0	0%

Arithmetic mean = 31.25K

(AF 51).

Also submitted was a document entitled OES Wage Data Page for the New York, NY PMSA for OES Code 34038 - "*Designers Except Interior Designers*," which gave the following description:

> Design or arrange objects and materials to achieve artistic or decorative effects for apparel or other commercial items. May also create, mark out, or draw designs for items such as furniture and machinery (products design). Designers are generally categorized according to articles or products designed, such as Clothes Designers, Industrial Designers or according to type of design work, such as Embroidery Designers. Include Layout Artists.

(AF 49).The Data Page reported a mean of 24.0700, a Level I of 12.6000 and a Level II of 29.8100. *Id*.

In a separate letter, Employer's counsel noted that the denial of the Employer's application was based on its failure to fully meet each and every requirement of GAL 2-98 which is neither a law nor regulation. (AF 57-59). He contended, in essence, that the proper focus should be on the average salary paid to Fashion Designers with one year experience and not on the Level II workers which represent those having one year or 50 years experience. (AF 59).

The CO apparently referred Employer's submission to the NYDOL Wage Specialist who issued an opinion to the effect that the Employer's job opportunity is properly classified as a Level II, fully competent employee, rather than a Level I, closely supervised employee. He noted in this regard:

> The employer's job requires an incumbent who designs women's apparel and finalizes design patters. The incumbent must also analyze fashion trends. It is reasonable to conclude the analysis and design duties require judgement and the independent evaluation, modification and application of standard procedures. It is also reasonable to conclude that analysis of fashion trends, presumably for the purpose of informing the designer's own creations, presents some unusual or complex problems that must be resolved. The job also requires the incumbent work closely with foreign manufactures to ensure the final product meets specifications.

(AF 60).

The CO proceeded to inform the Employer that its Request for Reconsideration was denied since it did not raise matters which could not have been addressed in the rebuttal, *citing Harry Tancredi*, 1988-INA-441. (AF 61). The record has been submitted to the Board for its review.

Discussion

We begin with the premise raised by Employer's counsel and with which we agree. That is that the GAL 2-98 is neither a law nor regulation. It is an internal document intended to offer guidelines to state agencies which are initially responsible for determining the appropriate prevailing wage when processing alien employment certification applications. The memorandum which accompanied publication of GAL 2-98 indicates that the directive was developed to increase the timeliness and accuracy of prevailing wage determinations and consequently, it was determined that this could be accomplished by using the wage component of the Bureau of Labor Statistics expanded Occupational Employment Statistics (OES) program.

Section 656.20 (c)(2) of the regulations provides that the ETA 750 must clearly show that the wage offered equals or exceeds the prevailing wage determined pursuant to §656.40 In turn §656.40 provides that if the position is not covered by a prevailing wage determination under the Davis-Bacon and Service Contract Acts, the prevailing wage shall be determined by the average rate of wages, that is the rate of wages to be determined, to the extent feasible, by adding the wage paid workers similarly employed in the area of intended employment and dividing the total by the number of such workers. "Similarly employed" is defined in subsection (c) as "having substantially comparable jobs in the occupational category in the area of intended employment."

We are particularly concerned in the instant case as to whether the OES wage classification employed by the wage specialist and CO comports with the regulatory requirement that it covers workers similarly employed in the duties embraced by the Employer's job offer. Both the wage specialist and the CO have criticized the Employer's wage surveys because they did not include a job description, However, neither the wage specialist nor the CO have placed into the record in this case the job description for the OES wage classification on which they relied. We will assume that it is the same as that contained in the OES Wage Data Page submitted by the Employer with its request for review/reconsideration as this comports with the Occupational Code 34038 referred to by NYDOL in its initial letter to the Employer.

As can be seen from the description set forth above, Code 34038 in the OES Wage Data is not confined to the occupation of Fashion Designer. Rather, it embraces all those engaged in the occupation of "Designers" (except Interior Designers) and includes a variety of design work including furniture and machinery as well as clothing. It does not break down the average salaries paid to workers in each of these endeavors. We note that the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* article on "Designers" is to the effect that designers usually specialize in a particular area of design, such as automobiles, clothing, furniture, home appliances, industrial equipment, movie and theater sets, packaging, or floral arrangements. The article goes on to indicate that there is a variance in the median annual earning among the industries employing designers.

We note further that the *Dictionary of Occupational Titles* (DOT), which continues to be used in the regulations as the reference for determining job descriptions, has a specific description

for the occupation of "Fashion Designer," code 142.061-018. The Employer's job offer is embraced in the DOT definition for this occupation. And, we agree with the Employer that it is reasonable to assume that the "Fashion Designers, Assistant Designers and Trainee Designers " referred to in its initial survey are also embraced by this definition.

There is an *Occupational Employment Statistics - 1998 Metropolitan Area Occupational and Wage Estimates - New York, N.Y. PMSA* posted on the DOL's Bureau of Labor Statistics Internet site which shows that there were 12,490 workers employed as "Designers, Except Interior Designers", Code 34038, during 1998. There is also an OES New York survey posted for the year 1999. This later survey breaks down the Designer occupations into various categories under SOC code numbers. "Fashion Designers" are designated under code 27-1022 which shows a total employment in this occupation of 4,160. Clearly with this many employees in the specific occupation with which we are here concerned, it is not necessary to go beyond the specific occupation of Fashion Designer to determine the prevailing wage for those similarly employed. It follows that the wage survey relied upon by the CO does not conform to the regulatory requirements for determining the prevailing wage in this particular case.

Even assuming that the reliance on the 1998 OES survey could be justified, we also perceive a due process problem in the way it has been applied in this matter. The survey on which the wage specialist and CO relied breaks Designers into two levels, *i.e.*, I and II. According to GAL 2-98, Level I represents beginning level employees and Level II represents fully competent employees. As there appears to be a wide difference in the OES averages for each level, determining the appropriate level in any individual case is of prime importance. While the NOF advised the Employer that its job offer had been classified as Level II, it was never informed that it could dispute this fact by submitting evidence to show the skill level of its job offering. We note, in this regard, that the ETA 750 indicates that the Alien is to work under the supervision of the Design Director which could mean that contrary to the assumptions of the wage specialist, he does not exercise totally independent judgment in the performance of his duties.

The Board has held that where an employer challenges the CO's wage determination, employer has the burden of proving both that the CO's determination is in error **and** that employer's determination is correct. *See, e.g. PPX Enter., Inc.*, 1988-INA-25 (May 31, 1989 (*en banc*). The Employer has submitted two wage determinations in which he approached the similarity of positions from the standpoint of incumbents' education and experience rather than the skill levels of GAL 2-98. It could well be that the limited experience factor translates into the lower of the two skill levels in an industry where design errors could be devastating in material and manufacturing costs. However, the Employer has not been given an adequate opportunity to document this factor although it is indicated by its first survey which shows that most of the recent graduates from FIT where still employed as assistant or trainee designers after one year.[2]

[2]There appears to be some corollary between the average salary in the Employer's initial survey with an average annual salary of $25,743 for graduates with one years experience and the OES figure of $26, 208 for skill level I, a difference of less than 5%.

However, without clarification of the skill level required in the Employer's job opportunity, its initial survey can not be accepted.

In regard to the Employer's second survey, we will accept that this evidence is properly before us for consideration.[3] Nevertheless, we must conclude that this survey clearly does not conform with the regulatory requirement that the prevailing wage must be arrived at by adding the wages paid to workers similarly employed and dividing that figure by the number of workers. The Employers survey deals instead with salary ranges offered or paid by recruiters and firms in the fashion field.

In view of the foregoing, we find it necessary to remand this case for additional development in order to clarify whether the Employer's job offer is for a position which should be clarified as Level I or II. The Employer should be given an opportunity to offer documentation to show to what degree, if any, the Alien's work is to be supervised and to present any other evidence to establish the proper classification of the position. The CO should then consider this evidence and determine whether this is a Level I or Level II position. If she decides that the Level I classification is justified, she should accept the Employer's latest wage offer of $31,000 per year and permit it to proceed with recruiting.

If the CO determines that the position had been correctly classified, a new wage determination based on the occupation of Fashion Designer must be undertaken.[4] If, in any event, the Employer's current wage offer of $31,000 is not accepted, a new NOF must be issued.

---

[3]Ordinarily, such evidence would come too late for our consideration as it was submitted subsequent to the issuance of the Final Determination. However, the Board has held that if the CO considers evidence submitted with a motion for reconsideration, the Board may also consider that evidence. *Construction and Investment Corp.*, 1988-INA-55 (Apr. 24, 1989) (*en banc*). Even though the CO rather summarily dismissed the Employer's motion in this case, it is obvious from her referral to the wage specialist, that the second survey was considered and rejected.

[4]The 1999 OES wage survey appears to breakdown the "Designer" classification and this survey may need to be used instead of the 1998 survey.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for action as outlined above.

For the panel:

_____

JOHN M. VITTONE
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.